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July 21, 1997

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FCC MAIL ROOM

Mr. William Caton
Federal Communications Commission
1919 M. Street, N.W.
Room 222
Washington, D.C. 20554

RE: In the Matter of MCI Telecommunication Corporation, Inc.'s
Petition for Declaratory Ruling Regarding Preemption of the Arkansas
Telecommunications Regulatory Reform Act of 1997 CC Docket No. 97-100

Dear Mr. Caton:

Enclosed for filing, please find an original and thirteen (13) copies of the Reply Comments of the Arkansas Telephone Association regarding the above referenced matter.

Kindly file the Reply Comments and return the extra file-marked copy to me in the enclosed self addressed stamped envelope I am providing for your convenience. I am mailing a copy of this letter and the Reply Comments to Ms. Janice Myles, Common Carrier Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C., 20554; ITS, Inc., 2100 M Street N.W., Suite 140, Washington, D.C., 20037; and all parties of record.

With kindest regards,

Sincerely,



GEORGE HOPKINS

Attorney at Law

GH/km

enclosure: Reply Comments of the Arkansas Telephone Association

cc: Ms. Janice Myles
ITS, Inc.
All parties of record

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 22 1997

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In the Matter of)
)
MCI Telecommunication Co., Inc.)
)
Petition for Expedited Declaratory Ruling)
Preemption Arkansas Telecommunications)
Regulatory Reform Act of 1997 pursuant to)
§§251, 252, and 253 of the Communications)
Act of 1934, as amended)

CC Docket No. 97-100

**REPLY COMMENTS OF
THE ARKANSAS TELEPHONE ASSOCIATION**

I. INTRODUCTION

The Arkansas Telephone Association ("ATA") provides these Reply Comments in opposition to MCI's Petition and to the comments that request preemption of any provision of the Arkansas Act or the authority of the Arkansas PSC to implement the Federal Act. The Reply Comments of the ATA are submitted pursuant to public notice DA97-1190 released June 6, 1997 in CC Docket No. 97-100.

The decision in Iowa Utilities Board v. FCC, __ F.3d __ (8th Cir. 1997) was entered by the Eighth Circuit Court of Appeals on July 18, 1997.¹ This decision has extensive impact on

¹ The ATA obtained a copy of the opinion over the Internet. The first page had a note that the opinion has an abbreviated case caption. The ATA will use page numbers based upon the copy obtained. The ATA will attempt to also provide the area from the opinion when quotes are used. For instance, the ATA will include the numbering index used by the Court, such as II.A.

the issues presented in the ACSI Petition and the MCI petition. The ATA has had limited time to review the decision due to the time requirements for filing these Reply Comments.²

II. ARGUMENT

A. OVERVIEW

The ATA finds no argument that the Arkansas PSC has failed to properly implement the Federal Act. The ATA finds no objection to any action taken by the Arkansas PSC. The ATA finds no specific allegation that the Arkansas Act has had the effect of prohibiting any entity from providing any telecommunications service. All the objections appear to be facial or textual challenges to the language of the Arkansas Act.

The opponents of the Arkansas Act ask the Commission to preempt the language of the Arkansas in the absence of any objection to the enforcement of such language by Arkansas. The interpretation of the Arkansas Act requires use of Arkansas statutory construction rules. Arkansas statutory construction rules provide great interpretative latitude to achieve legislative intent. The opponents of the Arkansas Act request that the Commission adopt their interpretation of the Arkansas Act and base their request for preemption on that interpretation.

The comments filed in support of the Arkansas Act and the decision in Iowa Utilities Board v. FCC provide clarification about when the Commission may preempt state law under the Federal Act. Interconnection agreement issues decided by a state PSC must be determined

² The ATA must send the Reply Comments from Arkansas in time for delivery in Washington, D.C. on Tuesday, July 22, 1997.

exclusively by appeal to federal district court, not by Commission review.³ Rural interconnection is a determination that the states have exclusive authority to make.⁴ Rural interconnection determinations are outside the Commission's jurisdiction by operation of §2(b).⁵ The Commission may not preempt a state rule due to mere inconsistency with a Commission regulation under §251.⁶ The state rule must also violate §253(a) and §253(b) to justify preemption.⁷

B. IOWA UTILITIES BOARD V. FCC PROVIDES RESTRICTIONS TO PREEMPTION.

1. States have exclusive authority to establish prices regarding the local competition provisions of the Act.

The court in Iowa Utilities Board vs. FCC stated:

We are not convinced by the respondents' arguments here, and we believe that the 1996 Act, when coupled with section 2(b), mandates that the states have the exclusive authority to establish the prices regarding the local competition provisions of the Act.⁸

The court held the states may set pricing guidelines for interconnection. Further, the court made it clear that § 2(b) leaves the states significant authority over both pricing and intrastate

³ Iowa Utilities Board v. FCC, __ F.3d __ (8th Cir. 1997) (at p. 31 II.D.).

⁴ See Id. (p. 26 II.C.).

⁵ See Id. (p. 28 II.C.).

⁶ See Id. (p. 35 II.F.).

⁷ See Id.

⁸ Id. (p. 14 II.A.).

service. The court stated that:

Moreover, we reiterate that the text of section 2 (b) itself indicates that the FCC does not have jurisdiction over matters “in connection with” intrastate service. . . . Because the impossibility exception does not apply in this case, section 2(b) remains a Louisiana-built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states’ intrastate turf.⁹

2. Consistent with the Federal Act, rural exemptions are left for the states to determine.

The court reviewed the Commission’s rules on rural exemptions related to §251 (f). The court held that:

The plain meaning of subsections 251 (f)(1) (governing exemptions) and 251 (f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations, and nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations.¹⁰

The court also found §2 (b) also came into play on the Commission’s jurisdiction over rural exemptions. The court stated:

We believe that determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations “for or in connection with intrastate communication service” that are outside of the FCC’s jurisdiction by the operation of section 2(b).¹¹

⁹ Id. at p. 21 II.A.

¹⁰ Id. (p. 26 II.C.).

¹¹ Id. (p. 28 II.C.).

3. Federal district court is the exclusive means to attain review of a state commission's interconnection agreement determinations under the Federal Act.

The court in Iowa Utilities Board v. FCC held that:

The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act. Instead, subsection 252 (e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations.¹²

Further the court concluded as follows:

We conclude that the language and structure of the Act combined with the operation of section 2 (b) indicate that the provision of federal district court review contained in subsection 252(e)(6) is the exclusive means of obtaining review of state commission determinations under the Act and that state commissions are vested with the power to enforce the terms of the agreements they approve.¹³

4. The Commission may not preempt state law merely for inconsistency with Commission regulations.

The court noted that the Commission may not preempt state law merely if it varies from Commission regulation. The test for preemption requires more. The court stated:

Even when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from preempting a state commission order that establishes access and interconnection obligations so long as the state

¹² Id. (p. 29 II.D.).

¹³ Id. (p. 31 II.D.).

commission order (i) is consistent with the requirements of section 251 and (ii) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of section 251 through 261. This provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251. . . . It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of §251 or Part II. In this circumstance, subsection 251 (d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.¹⁴

5. The Court noted the Commission's limited preemption rights under § 253.

The court reviewed the Commission's authority to require state rules on interconnection and access to be consistent with Commission regulations and stated:

While subsection 253 (d) does empower the Commission to preempt some state policies, those state policies are limited to those that violate the terms of subsections 253 (a) or 253 (b). 47 U.S.C.A. §253(d). Neither subsection 253 (a) nor 253 (b) requires state policies to conform to any Commission regulations; 253(a) merely requires state policies not to prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service," and 253 (b) allows states to impose additional telecommunications requirements as long as they are competitively neutral and consistent with the universal service obligations of section 254.¹⁵

C. MCI's OBJECTIONS DO NOT JUSTIFY PREEMPTION.

In an overview, the comments in support of the Arkansas Act establish compelling

¹⁴ Id. (p. 35 II.F.).

¹⁵ Id. (p. 35 II.F.).

arguments to deny preemption even without reference to Iowa Utilities Board v. FCC. The ATA restates its support for the arguments made in the comments.

A few points made in support of the Arkansas Act in the comments should be emphasized again. First, the opponents of the Arkansas Act object to language and text, not to action. As the decision in Iowa Utility Board v. FCC establishes, a law is subject to several potential interpretations.¹⁶ The Commission should not impose the interpretation requested by opponents of the Arkansas Act without any enforcement of the Arkansas Act taken to justify such an interpretation.

Second, the Arkansas PSC has approved interconnection agreements and the opponents do not argue the Arkansas PSC violated the Federal Act by such approvals.¹⁷ Third, no argument is made that the Arkansas Act has had the specific effect of prohibiting any entity from providing any telecommunications services as required by §253 (a).¹⁸ Fourth, many provisions in the Arkansas Act must be implemented by regulation of the Arkansas PSC. Several rules are yet to be established. It is premature to assume the Arkansas PSC will develop rules that will require preemption.

1. Arkansas Act § 9(d) on purchasing promotional services for resale is not subject to preemption.

First, the interpretation of this language is not established. The comments of the ATA provide that §9 (d) may be interpreted to apply only to periods of less than 90 days. Second, no

¹⁶ Many parties argued for various interpretations of the Federal Act. The court did not accept the proposed interpretations of many parties on various sections.

¹⁷ See ATA Comments, fn. 17.

¹⁸ Federal Act §253(a).

objection is made to the Arkansas PSC's enforcement of §9(d). Third, no showing is made that any entity has been effectively prohibited from providing any telecommunications service due to this language. Fourth, any objection to Arkansas PSC enforcement of § 9(d) in agreements is to be heard exclusively by a federal district court, not the Commission. ¹⁹

2. Arkansas Act § 9 (g) on setting prices for interconnection agreements is not subject to preemption.

Again, the interpretation is not established, enforcement is not an issue, and no showing is made that any entity has been prohibited from providing any telecommunications service. Most importantly, the states have the exclusive right to determine pricing in interconnection agreements. ²⁰ Finally, any objection to such determinations must be heard exclusively in federal district court. ²¹

3. Arkansas Act § 9 (i) on approval of agreements and SGATS is not subject to preemption.

The issues on interpretation, enforcement by Arkansas, and lack of proof on effect of prohibiting any entity from providing any telecommunications service also apply here as in § 9 (d) and § 9 (g). The states have exclusive rights to determine and decide interconnection agreements and related issues. ²² Any objection to the Arkansas PSC's decisions related to such matters is to

¹⁹ See Iowa Utilities Board v. FCC __ F.3d. __ (8th Cir. 1997) (p. 29 II.D.).

²⁰ See Id.(p. 14 II. A.).

²¹ See Id. (p. 29 II.D.).

²² See Id.

be heard exclusively by a federal district court, not the Commission.²³

4. Arkansas Act § 10 on Rural Exemptions should not be preempted.

First, the interpretation of § 10 is not established. Second, how this language will be enforced is not known. Third, no showing is made that this language will prohibit any entity from providing any telecommunications service. Fourth, the states have exclusive authority to make determinations on rural exemptions.²⁴ Fifth, §2 (b) of the Federal Act may affect the Commission's jurisdiction over rural exemption determinations.²⁵

5. Arkansas Act § 4 on universal service should not be preempted.

First, the rules to implement § 4 are not established. Second, the proper interpretation and enforcement of § 4 is not established. Third, Arkansas may establish a state universal service fund that differs from the Federal Universal Service Fund. A state may establish and carry out state policy without exactly mirroring federal policy. Fourth, no showing is made that §4 has the effect of prohibiting any entity from providing any telecommunications service. Fifth, §2 (b) of the Federal Act should encourage caution on action taken to preempt a state's regulation of intrastate telecommunications services.

²³ See Id.

²⁴ See Id. (p. 26 II.C.).

²⁵ See Id. (p. 28 II.C.).

6. Arkansas Act § 5 on ETCs should not be preempted.

First, the proper interpretation of §5 is not established. Second, no objection is made to how the Arkansas PSC has enforced §5. Third, no showing is made that §5 will have the effect of prohibiting any entity from providing any telecommunications service. Fourth, the AUSF does not have to be exactly like the FUSF. Arkansas has not violated the Federal Act by establishing the AUSF or allowing one ETC in rural areas. Section 2 (b) of the Federal Act should encourage caution on action to preempt a state's regulation of intrastate telecommunications services.²⁶ The comments establish that §5 may be interpreted as consistent with the Federal Act.

7. The Arkansas PSC's authority should not be preempted.

The Arkansas PSC has not failed to fulfill its duties under the Federal Act. The Commission may only take enforcement action if a state commission "fails to fulfill its duties under the Act."²⁷ Any error in how it fulfills its duties on agreements is subject exclusively to a federal district court review.²⁸ The Arkansas PSC's authority should not be preempted.

CONCLUSION

The comments fail to establish any material violation of any provision of federal law that would justify the preemption of the Arkansas Act by the Commission. The Commission should deny the petition of MCI.

²⁶ See Id.

²⁷ See Id. (p. 30 II.D.).

²⁸ See Id. (pp. 29-30 II.D.).

Respectfully submitted,

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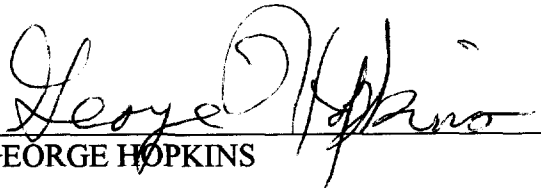
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Arkansas Telephone Association
Members:

ALLTEL Arkansas, Inc.
Arkansas Telephone Co.
Central Arkansas Telephone Cooperative
Century Telephone of Arkansas
Century Telephone of Mountain Home
Century Telephone of Redfield
Century Telephone of South Arkansas
Cleveland County Telephone Co.
Decatur Telephone Co.
GTE Southwest, Inc.
GTE Arkansas, Inc.
Lavaca Telephone Co.
Madison County Telephone Co.
Magazine Telephone Co.
Mountain View Telephone Co.
Northern Arkansas Telephone Co.
Prairie Grove Telephone Co.
Rice Belt Telephone Co.
E. Ritter Telephone Co.
Scott County Telephone Co.
Southwest Arkansas Telephone Cooperative
Southwestern Bell Telephone Company
Tri-County Telephone Company
Walnut Hill Telephone Company
Yelcot Telephone Company
Yell County Telephone

CERTIFICATE OF SERVICE

I, George Hopkins, do hereby certify that the foregoing comments of the Arkansas Telephone Association have now been served on this 21st day of July, 1997, to the parties of record as listed.



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